Supreme Court of the United States

OCTOBER TERM, 1927.

No. 211.

T. H. SMALLWOOD, W. F. SMALLWOOD, A. D. SMALLWOOD, *et al.*, etc.,

Petitioners,

—vs.—

JUAN G. GALLARDO, TREASURER OF PORTO RICO.

No. 212.

ADOLFO VALDES ORDONEZ, SALVADOR GARCIA, VICTOR OCHOA, *et al.*, etc.,

Petitioners,

—vs.—

JUAN G. GALLARDO, TREASURER OF PORTO RICO.

No. 213.

INSULAR MOTOR CORPORATION,

Petitioner,

—vs.—

JUAN G. GALLARDO, TREASURER OF PORTO RICO.

PETITIONERS' REPLY BRIEF

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T. H. Smallwood, W. F. Smallwood, A. D. Smallwood, *et al.*, etc., Petitioners, —vs— Juan G. Gallardo, Treasurer of Porto Rico	No. 211
Adolfo Valdes Ordonez, Salvador Garcia, Victor Ochoa, *et al.*, etc., Petitioners, —vs— Juan G. Gallardo, Treasurer of Porto Rico	No. 212
Insular Motor Corporation, Petitioner, —vs— Juan G. Gallardo, Treasurer of Porto Rico	No. 213

PETITIONERS' REPLY BRIEF.

Time is available for a short response only. This will be confined to what is not already covered by our original brief.

I.

The first and fifth and most of the third and sixth points of respondent are wholly outside the limits prescribed for the October 3 hearing. His discussion is of matters which he unsuccessfully urged on the Circuit Court of Appeals

and which it would be impertinent to argue here even on consideration of the merits except after leave to assign cross errors.

II.

The second point begs the question. It rests solely upon the assumption that the new statute applies to pending cases. Respondent asserts that, if so, the statutes defining the jurisdiction of the District Court of the United States for Porto Rico have been amended or partially repealed. That is his contention in its entirety. But the very nub of the controversy is as to how the provision added by section 7 of the Act of March 4, 1927, should be construed. It contributes nothing toward a solution of the problem to say that an interpretation in respondent's favor would change pre-existing statutes.

III.

The part of his third and sixth points not treated in our original brief or determined below adversely to respondent relates exclusively to a Porto Rican statute (Respondent's Appendix I) enacted April 19, 1927, subsequent to the filing of the petition for certiorari in this Court, and to regulations of the treasury department of Porto Rico (Respondent's Appendix VIII) adopted October 13, 1927, subsequent to the institution of all these suits (R., 14, 59, 76). Manifestly the statute and regulations are of no concern at this stage. Moreover, the regulations deal solely with taxes under section 62 of the statute of 1925, whereas two of the cases (Nos. 211-2) arise under the statute of 1923 and the third (No. 214) arises under section 16 of the Act of 1925.

IV.

Only scrutiny of the decisions themselves will adequately demonstrate the error of respondent in saying, with respect to the issue of interpretation, that there is a distinction be-

tween statutes affecting procedure or remedy and statutes affecting vested rights. If the question were as to the power to legislate or as to validity of the statute, the difference would exist. What, however, within the meaning of particular language, is retrospective in operation in no wise depends on whether the subject is procedure or remedy or is a vested right. The settled rules are identical for interpreting statutes of both classes. True, some courts use the fact, that application of a new statute to a pending case would destroy a vested right, as one of the grounds for refusing to ascribe to the legislature intention to bring about that result; but the canons summarized in our original brief are the same for construing statutes with regard to procedure or remedies as for construing those with regard to vested rights. In addition, what constitutes a vested right frequently presents a narrow or abstruse question; and it is sufficient now to remark that, upon the records in the present causes, an interpretation which would deprive tax payers of a remedy with respect to the large funds held in the registry of the court in Porto Rico would plainly be such deprivation of vested rights as to amount to denial of due process and that an interpretation imperiling those funds should be rejected.

Dated, October 1, 1927.

Respectfully submitted,

FRANCIS G. CAFFEY,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1927

No. 214

ADOLFO VALDES, PIO PEREZ, LUIS C. CUYAR, *et al.*, etc.,

Petitioners,

vs.

JUAN G. GALLARDO,

Treasurer of Porto Rico.

No. 215

FINLAY, WAYMOUTH & LEE, INC.,

Petitioners,

vs.

JUAN G. GALLARDO,

Treasurer of Porto Rico.

No. 216

ANGEL ABARCA PORTILLA, RAFAEL ABARCA PORTILLA, ENRIQUE ABARCA SANFELIZ, *et al.*, etc.,

Petitioners,

vs.

JUAN G. GALLARDO,

Treasurer of Porto Rico.

CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITIONERS' REPLY BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1927.

ADOLFO VALDES, PIO PEREZ, LUIS C. CUYAR, *et al.*, etc., *Petitioners*, vs. JUAN G. GALLARDO, Treasurer of Porto Rico.	No. 214
FINLAY, WAYMOUTH & LEE, INC., *Petitioner*, vs. JUAN G. GALLARDO, Treasurer of Porto Rico.	No. 215
ANGEL ABARCA PORTELLA, RAFAEL ABARCA PORTELLA, ENRIQUE ABARCA SANFELIZ, *et al.*, *Petitioners*, vs. JUAN G. GALLARDO, Treasurer of Porto Rico.	No. 216

PETITIONERS' REPLY BRIEF.

Respondent, it seems to us, quite needlessly has burdened the court with a vast amount of wholly irrelevant matter

We shall endeavor very briefly to separate the wheat from the chaff and answer what is germane to the question being argued.

I.

Whether or not Section 3224 U. S. Rev. Stat. was applicable to Porto Rico, and whether or not petitioners had an adequate remedy at law at the time they brought these suits, are not within the scope of the question this court has directed to be argued. Respondent's contention on each of those points has been ruled adversely to him by the Circuit Court of Appeals. They thus go to the merits of these cases, and the merits are not being argued at this time. Consequently respondent's Points I and V and Appendices I, II, III, IV and VII may be disregarded.

II.

Respondent's Point II (Brief, pp. 13-22) is based upon the assumption that the Act of March 4, 1927, is a modification or diminution or withdrawal of the jurisdiction of *the District Court*. That assumption is unwarranted and hence the argument and authorities cited are immaterial.

If Congress had intended to modify or diminish the jurisdiction of the District Court it certainly would have said so directly and in terms—as it did in the Act of February 13, 1925, referred to in *Federal Land Bank v. U. S. Nat. Bank*, 13 Fed. (2d) 26, quoted on page 14 of respondent's brief. It would not have resorted to indirection and ambiguity.

There may appear to be little difference between say

ing "The District Court shall not have jurisdiction to grant an injunction restraining the assessment or collection of any tax" and saying "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained." But some difference there certainly is. And not the least difference is that even if the former form of expression indicate an intent that no injunction shall be granted after the act is passed, the latter form of expression certainly indicates an intent to regulate future suits only.

That the Act of March 4, 1927 is not a modification or diminution or withdrawal of *jurisdiction* is manifested by the fact that its prototype, U. S. Rev. Stat., Sec. 3224, has not been so regarded. If Section 3224 had been a limitation upon the jurisdiction of the courts, this court could not have held, as it did hold in *Hill* v. *Wallace*, 259 U. S. 44, that it "does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provision inapplicable." If jurisdiction did not exist the court could not grant the injunction however extraordinary or exceptional the circumstances were, and the fact that the injunction was granted in *Hill* v. *Wallace* shows that Section 3224 is not regarded as regulating the jurisdiction of the court.

Both Section 3224 and the Act of March 4, 1927 are addressed to and are limitations upon the rights and powers of the *taxpayers* rather than upon the rights and powers of the *court*.

As the Act of March 4, 1927, is not a limitation upon the jurisdiction of the court, it follows that none of the

authorities cited under Point II of respondent's brief is relevant.

Respondent calls attention to the fact that in enacting Section 41 of the Organic Act of Port Rico, Congress inserted a proviso saving the jurisdiction over then pending cases (Res. Brief, p. 19); and from that he argues that as no similar proviso was inserted in the Act of March 4, 1927, the necessary conclusion is that Congress intended not to save pending cases (id. p. 20). But respondent's own brief furnishes an answer to that argument. If the Act of March 4, 1927 is to be read as an amendment to Section 41 of the Organic Act (which is the assumption upon which respondent's Point II is based), *then it of course becomes subject to the saving clause therein contained* and Section 41 is to be read as if it conferred general jurisdiction and then excluded suits for injunctions in tax cases and then saved pending cases. For obviously respondent cannot treat the Act of March 4, 1927, as a part of Section 41 for the purpose of construing it as a diminution of the jurisdiction there conferred and then treat it as outside of Section 41 for the purpose of avoiding the saving clause. If he wish to have the Act of March 4, 1927, construed as if it amended Section 41, he must take the consequences of reading the entire amended section as a whole—saving clause and all.

III.

In Point III of his brief respondent argues (a) that there are no unusual circumstances bringing these cases within the implied exception stated and enforced in *Hill v. Wallace*, and (b) that such an implied exception is not

applicable to the Act of March 4, 1927, "since the District Court of the United States for Porto Rico is not a constitutional court of the United States" (Res. Brief, p. 22).

Dealing with the latter argument first, the obvious retort is that neither are the District Courts located in the several States "constitutional courts of the United States." Those District Courts were created by Congress. Like the District Court for Porto Rico, they are "but the creature of Congress exercising such powers, and such powers only, as the Congress may have granted to them." Congress could abolish them just as well as it could abolish the District Court for Porto Rico. The doctrine of *Hill* v. *Wallace* hence is just as applicable to the Act of March 4, 1927, as it is to Section 3224.

Returning now to the first branch of the argument. To say that there are no exceptional or unusual circumstances in these cases is to push naievete to the point of irony. We cannot believe that even counsel for the respondent could keep his face straight while saying it.

The circumstances here are identical with those which were held in *Hill* v. *Wallace* to be so exceptional as to make Section 3224 inapplicable, viz., to make a sale without paying the tax subjects the seller to heavy criminal penalties, and to pay the tax on each of the many daily sales and then sue to recover it back would necessitate a multiplicity of suits and would be impracticable (See pp. 14-18 of our first brief).

Respondent points out that under regulations adopted by him after many of these suits had been brought (including Nos. 214 and 216) the sales tax is computed and paid once a month upon all sales had during the month (Res.

Brief, pp. 23, 103-105). But he glosses over the fact that the excise tax is payable "upon selling or transferring the taxable article" (Sec. 37) and must be paid "by affixing and cancelling internal revenue stamps on such documents and articles" (Sec. 35). The plain truth is that the sale of a box of matches without affixing the stamp might land the seller in jail for a year and subject him to a fine of a thousand dollars; and if he sold ten boxes he could be fined ten thousand dollars and sent to jail for ten years. The same thing is true with respect to forty three other articles subject to the excise tax.

Every merchant is making many sales of such articles each day. Each merchant must pay the tax on each sale or stop selling or go to jail.

IV.

We confess our inability to follow or understand respondent's Point IV.

1. So far as it asserts that petitioners have no vested right in any *particular form* of procedure we agree with it. We agree, also, with its concession that petitioners have a *right* to "a reasonable opportunity to test the validity of the taxes of which they complain". (Res. Brief, p. 25.) If the Act of March 4, 1927, be construed as depriving them of the right to relief in these cases that conceded right certainly is taken away, for the reasons pointed out at pp. 18-20 of our first brief.

Respondent's assertion that petitioners might file a bill for injunction *in an insular court* (an assertion thrice repeated at pp. 11, 23, 25 of his brief) is a MISSTATE-

MENT, doubtless inadvertent, arising from counsel's failure to remember that Section 4 of the Insular Injunction Law (Sec. 1357 of 1911, Comp. of Porto Rico Codes and Statutes) provides:

> "An injunction cannot be granted: * * *
>
> "3. To prevent the execution of a public statute by officers of the law for the public benefit."

To that there has now been added by Act No. 26 of April 23, 1927 (Laws of Porto Rico of 1927, pp. 166, 168):

> "7. To prevent the levy or collection of any tax levied by the laws of the United States or of Porto Rico."

Injunctions are thus effectively barred in the Insular Courts as well as in the District Court.

2. If respondent mean that there is a distinction as to the *power to enact* statutes changing the remedy and the *power to enact* statutes affecting vested rights, he may be correct; but if he mean that a statute which takes away an existing remedy is *not* retrospective, whereas a statute which, in the same words, takes away a vested right *is* retrospective, we submit that the argument is too grossly absurd for discussion. If an existing right be taken away by a statute, that statute is retrospective whether the right taken away be described as substantive or remedial.

3. If respondent mean to deny that the rule that statutes are not to be given a retrospective or retroactive effect does not apply to statutes governing procedure, he is

clearly wrong. We again quote the language of this court in *United States* v. *St. Louis, etc. Ry. Co.*, 270 U. S. 1, 3:

> "That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. **It has been applied by this court to statutes governing procedure.**"

The cases of *Fullerton Co.* v. *Northern Pacific Ry. Co.*, 266 U. S. 435, and *United States* v. *St. Louis, etc. Ry. Co.*, 270 U. S. 1, both related to statutes of limitation; and statutes of limitation, in this country at least, are "treated as *laws of procedure and as belonging to the lex fori, as affecting the remedy only and not the right*" (*Davis* v. *Mills*, 194 U. S. 451, 454; *Pritchard* v. *Norton*, 106 U. S. 124, 130, 131).

Those cases thus demonstrate that statutes changing procedure or affecting remedies and statutes affecting so-called substantive or vested rights are both subject to the same rule of construction, viz., that they are not to be given a retroactive effect unless imperatively required.

V.

In the last analysis the fundamental question here is one of interpretation. *Did Congress intend that the Act of March 4, 1927, should apply to these cases?*

The cases present important questions as to the power of Porto Rico to tax sales of goods brought there from continental United States and from foreign countries and as to its right to discriminate against such goods in favor of domestic products. The cases had been litigated through

the District Court and the Circuit Court of Appeals. The tax statute had been sustained in part and adjudged partly invalid. No injunctions had been issued, but the Circuit Court of Appeals had directed the issuance of injunctions as to goods imported from foreign countries. Everyone knew that applications for certiorari to bring the cases here for final decision were to be made.

Was Congress consciously and deliberately intending to prevent a review of these cases by this court? Was it consciously and deliberately intending to prevent the issuance of the injunction which the Circuit Court of Appeals had ordered?

Was Congress consciously and deliberately saying to the taxpayers and the insular authorities: "Although you have carried this litigation through the lower courts and nearly to the Supreme Court, you must now, on March 4, 1927, throw away the time and labor expended upon that litigation and go back and start over again, by paying the taxes under protest and then suing in the insular court to recover them, taking further appeals to the Circuit Court of Appeals, which already has decided the questions, and then go up to the Supreme Court in another form of action after a delay of several years. And meanwhile you taxpayers and insular authorities must remain in uncertainty and doubt as to what taxes you must pay and what taxes you have authority to exact. The promotion and prolongation of litigation is for the benefit of the public, and uncertainty and delay are desirable. Final decisions as to your power should be delayed as long as possible. Business men should be compelled to remain in a state of un-

certainty as to their taxes, to the end that enterprise may be stagnated."

That, in substance, is what respondent would have this court say is what Congress intended.

There was no emergency necessitating the immediate cutting off of the power of the District Court to issue injunctions in tax cases. *The Governor of Porto Rico himself had told Congress that while conditions had been bad in the past the trouble had been eliminated and that taxes were being collected rapidly and satisfactorily.* (See statements of Governor Towner at pp. 91, 92, 93, of respondent's brief.)

Is it not plain, then, that the legislation was sought and granted *for the future only?* Can it be believed that, with that representation before it, Congress intended that this statute should be given a construction which would prevent an early determination by this court of questions which already had been decided in the Circuit Court of Appeals and which were about to be brought here by certiorari?

Common sense revolts at the idea that Congress intended any such thing. Every consideration of expediency and justice—and, we add, the best interests of Porto Rico itself, despite its Attorney General's attitude to the contrary—demand that the statute be construed as inapplicable to pending cases, to the end that there may be a speedy determination by this court of the questions of law involved as to the validity of the taxes which Porto Rico seeks to exact.

If respondent be correct in his contention that the petitioners have a plain, adequate and complete remedy by

paying the taxes and suing to recover them, and may yet pursue that remedy without embarrassment or difficulty and without fear of being "tricked" out of their money by the insular authorities, then the most that will be accomplished by holding that the Act of March 4, 1927, applies to these cases will be the delay and expense incident to the litigation which will be involved in such suits for the recovery of the taxes. Certainly there is nothing helpful or beneficial to anyone in adopting that course when cases presenting the questions as to the validity of the taxes already are in this court ready for immediate argument and determination.

If doubt existed as to how the Act of March 4, 1927, should be construed, that consideration of itself would be sufficient to cause the doubt to be resolved in our favor.

Respectfully submitted,

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